No. 91-375

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JIM C. PLEDGER, DIRECTOR OF THE ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, TIM LEATHERS, COMMISSIONER OF REVENUES, AND JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS ..... *Petitioners*

vs.

STANLEY BOSNICK AND WILLA S. LINDSEY, GEORGE E. STEWART, DON LANE, JOHN SANDFORT, WILLIAM DAWSON BARLOW AND HANK GAJDA, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF OF PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION

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RULES INVOLVED

Rule 2 of the Arkansas Rules of Appellate Procedure provides in pertinent part:

> (a) An appeal may be taken from a circuit, chancery, or probate court to the Arkansas Supreme Court from:
> . . . 9. An order certifying a case as a class action in accordance with ARCP Rule 23.
>
> (b) An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment.

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I.

THE ARKANSAS SUPREME COURT DID NOT DECIDE THIS CASE AS A MATTER OF STATE LAW REGARDING CLASS CERTIFICATION, BUT RATHER ON PRINCIPLES OF FEDERAL LAW.

On Page 1 of their Brief in Opposition, Respondents state that this Court should not consider the issue raised in Section I of the Petition "because it represents an improper

attempt to transform a state law issue of class certification into a federal question." In support of this proposition, Respondents have incorrectly stated Arkansas law as to the appealability of a class certification order. It is true that Rule 2(a)(9) of the Arkansas Rules of Appellate Procedure (ARAP) provides that an appeal of an order of class certification *may* be taken at the time of the entry of the order, even if it is entered prior to the entry of a final order on the merits of the case. Prior to the amendment of ARAP 2 in 1985, class orders could not be appealed before entry of a final order on the merits. However, ARAP 2(a)(9) does not state that a class order *must* be appealed when entered. A further examination of ARAP 2 supports this position.

ARAP 2(b) states that an appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment. Historically, class orders have been treated as intermediate orders by the Arkansas Supreme Court, and that court has reviewed these orders along with final orders. See *Slade v. Gammill*, 226 Ark. 244, 289 S.W.2d 176 (1956); *Creekmore v. Izard*, 236 Ark. 558, 367 S.W.2d 419 (1963). The amendment of ARAP 2 in 1985 to allow for an immediate appeal of a class order did nothing to change the nature of such an order as an intermediate order, and such an order may also be appealed at the time of the entry of a final order on the merits.

Notwithstanding the above discussion, this part of the case was not decided on the issue of class certification, but rather on the basis of federal law. In their Petition, Petitioners have used the term "class" in the generic sense to get the point across that the doctrine of intergovernmental tax immunity should not be applied to grant a refund of income tax to military retirees or retirees from employment with other

states and their political subdivisions. This portion of the case transcends a mere class certification issue, because it actually concerns the application of federal law to these subclasses. It is obvious that the Arkansas Supreme Court was also using the term "class" in the generic sense when it stated:

> However, whether the appellants failed to appeal that order in a timely manner is moot because we affirm for the reasons set forth below. . . . (P. App. A-4)

The Arkansas Supreme Court then decides the case on the basis of federal law and precedents. Examined in the proper context, this passage refutes Respondents' argument that Petitioners are attempting to transform a mere state law issue of class certification into a federal question.

II.

THE EXTENSION OF THE DOCTRINE OF INTER-GOVERNMENTAL TAX IMMUNITY AND 4 U.S.C. §111 TO MILITARY RETIREES AND RETIREES FROM EMPLOYMENT WITH OTHER STATES AND THEIR POLITICAL SUBDIVISIONS BY THE ARKANSAS SUPREME COURT CONSTITUTES A DECISION OF AN IMPORTANT FEDERAL QUESTION.

The decision of the Arkansas Supreme Court to grant a refund of Arkansas Income Tax paid on the retirement income of military retirees and retirees from employment with other states and their political subdivisions clearly decides a federal question in a way that conflicts with decisions of federal courts and of another state court of last resort as to whether the tax discriminates on the basis of the source of the taxed income, and if so, whether there are significant differences between the two classes to justify such treatment.

The bare statement by Respondents that this case "turns upon principles of state law" (Resp. Br. 1) falls upon closer examination.

> Footnote 8 of Respondents' Brief in Opposition states:
>
> Federal law should not preempt state law in situations such as this, where state law has consistently characterized military retired pay as deferred compensation for state tax and domestic property matters and that characterization does not violate federal law. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1974); *United States v. Yazell*, 382 U.S. 341, 352 (1966). (Resp. Br. 5)

However, this Court has intervened when questions of federal law are not adequately served by state court application. As was stated by this Court in *Yazell*, state interests should be overridden by the federal courts "where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." (382 U.S. at 352)

It is undisputed that until recently, the doctrine of intergovernmental tax immunity had not been invoked in the manner in which the Arkansas Supreme Court has done in this case. It is the position of the Petitioners that this application of a federal statute and a federal constitutional doctrine by the state court threatens clear and substantial federal interests. This threat is made even more clear by the exact opposite result reached by the Kansas Supreme Court in *Barker v. Kansas*, 815 P.2d 46 (1991). In fact, this Court, in both *Hisquierdo* and *Yazell*, granted certiorari to examine such novel state entanglements with federal law. Therefore, it

is just as clear that certiorari should be granted in this case.

There is no conflict between Petitioners' use of the word "pension" on Page 12 of their Petition and the arguments espoused in said Petition, as is suggested in Footnote 5 of Respondents' Brief in Opposition. (Resp. Br. 4) The word "pension" is being used in the generic sense as that is the form in which it was used by the Arkansas Supreme Court. (P. App. A-9)

There has been no case on point cited for the proposition that the doctrine of intergovernmental tax immunity should be extended to retirees from employment with other states and their political subdivisions. Respondents' citation of *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1983) is misplaced, since *Davis* was dealing with a state's tax treatment of federal employees. Respondents' quote from *Davis* on Page 15 of their Brief in Opposition, when examined in light of the case it cited, *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376 (1960), is clearly taken out of context. In *Phillips*, this Court stated:

> The imposition of a heavier tax burden on lessees of federal property than is imposed on lessees of other exempt public property must be justified by significant differences between the two classes. (361 U.S. at 383)

When taken in the proper context, there is nothing in the cases cited by Respondents which supports their claim that the doctrine of intergovernmental tax immunity should be extended to other states' retirees. Furthermore, although Respondents have alleged an Equal Protection violation, the Arkansas Supreme Court made no such finding, and the issue

should not be brought up in response to this Petition.

III

AN IMPORTANT FEDERAL QUESTION IS PRESENTED BY THE DECISION OF THE ARKANSAS SUPREME COURT TO PROVIDE RETROACTIVE RELIEF.

The claim of Respondents that no substantial federal question is presented by the decision of the Arkansas Supreme Court to provide retroactive relief in this case is contradicted by the very fact that most of Respondents' Brief in Opposition is devoted to a discussion of the federal questions presented. Respondents' discussion of the application of the three-factor test used by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 (1971) is a prime example. In this discussion, Respondents only highlight the conflict posed by the Arkansas Supreme Court's decision and the decisions of the Supreme Courts of Virginia, South Carolina, and North Carolina.

In addressing the first prong of the *Chevron* test, Respondents state:

> *Davis* "was not revolutionary . . . nor [did it] decide a wholly new issue of first impression." *Ashland Oil, Inc. v. Caryl*, ___ U.S. ___, 110 S.Ct. 3202, 3205 (1990) (emphasis added) *See also National Mines Corporation v. Caryl*, ___ U.S. ___, 110 S.Ct. 3205 (1990). (Resp. Br. 22)

Neither *Ashland Oil* nor *National Mines* directly refers to *Davis* in particular, so the structure of this particular sentence in Respondents' Brief is misleading.

The analysis by Respondents of the second and third prongs of the *Chevron* test are contrary to the analysis made by the Supreme Court of Virginia in *Harper v. Virginia Dept. of Taxation* and *Lewy v. Virginia Dept. of Taxation*, 401 S.E.2d 868 (1991); the Supreme Court of South Carolina in *Bass v. South Carolina*, 395 S.E.2d 171 (1990); and the Supreme Court of North Carolina in *Swanson, et al. v. North Carolina, et al.*, Docket No. 64PA91-Wake (August 14, 1991), further illustrating the dramatic conflict created by the decision of the Arkansas Supreme Court. Although Respondents note that the decisions in *Harper* and *Bass* have been vacated and remanded, Respondents do not seem to recognize that these cases were not simply reversed, which would have supported their claim that Petitioners' reliance on these cases was "misplaced." (Resp. Br. 20, FN 17) Further, Respondents do not even bother to address the *Swanson* case, which was issued by the North Carolina Supreme Court *after* the *Harper* and *Bass* cases were remanded.

Respondents have argued that any issue of the retroactive or prospective application of *Davis* has been conclusively resolved by the case of *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___ , 115 L.Ed.2d 481, 111 S.Ct. 2439 (1991). At Page 19 of their Brief in Opposition, Respondents state:

> In fact, the plurality in *Beam* cited *Davis* as support for the proposition that, when the Court remands a case for consideration of remedial issues without reserving the question of retroactivity, it "necessarily implies that the precedential question has been settled to the effect that the rule of law will apply to the parties before the Court." *Beam*, 111 S.Ct. at 2445-2446. Accordingly, *Davis* is properly read as having applied the rule of law

announced therein to the parties in that case. (Resp. Br. 19)

A closer look must be taken at the "support" *Davis* lends to the proposition set forth by Respondents. *Davis* was one of several cases set forth in this passage, with all the rest listed as "see" and "see also." *Davis* was the only case cited as "cf.", which actually invites the reader to compare and contrast. The citation's relevance will usually be clear to the reader only if it is explained. Such an explanation of the relevance of *Davis* to the remedial issues in *Beam* is provided by the North Carolina Supreme Court in *Swanson*, and this explanation refutes Respondents' analysis of the citation of *Davis* in *Beam*.

CONCLUSION

Respondents' arguments have done nothing to diminish the importance which should be placed on a review of this case by this Court. In fact, Respondents' arguments only highlight the fact that there is a dramatic conflict between the decision of the Arkansas Supreme Court and the Supreme Courts of Virginia, South Carolina, North Carolina, and Kansas with regard to these issues, and that the Petition should be granted to directly address these issues in a way that will leave no doubt as to the proper application of the doctrine of intergovernmental tax immunity and the retroactive or prospective application of *Davis* in this instance. Therefore, certiorari should issue to the Supreme Court of Arkansas so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

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